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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/846,394	05/02/2001	Kayoko Yamaguchi	Q64290	4035

7590

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SUGHRUE, MION, ZINN
MACPEAK & SEAS, PLLC
2100 Pennsylvania Avenue, NW
Washington, DC 20037-3213

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EXAMINER

PRATT, HELEN F

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 08/01/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/846,394

Applicant(s)

YAMAGUCHI ET AL.

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 June 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3,5,7,9,11 and 13 is/are rejected.
- 7) ☐ Claim(s) 2, 3, 6, 8, 10, 12, 14 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 5, 7, 9, 11, 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Talkington et al. (4,960,602) in view of Emoto (6,458,395) and Tomida (5,914,149).

ALLOWABLE SUBJECT MATTER

Claims 2, 4, 6, 8, 10, 12, 14 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

ARGUMENTS

Applicant's arguments filed 6-5-03 have been fully considered but they are not persuasive. Applicants argue that there is no reason to combine the references to Talkington and Emoto because Emoto contains various ingredients different than Talkington, and that it is to a gel, which was liquid before it gelled and that a gel is a solid, which behaves differently than that of a gel. However, nothing has been shown the fact that the composition is in a gelled state makes the ingredients of Talkington and Emoto incompatible. For instance, one can have the same composition in a gelled state or a liquid state and the ingredients in each composition still perform their known

functions in the same way. In addition, the composition is said to have a soft jelly form (abstract).

Applicants argue that Emoto does not show a transparent drink in that it contains ingredients that may not be transparent and that the use of gelatin does not necessarily produce a transparent product. However, gelatin-containing compositions such as JELLO (TRADEMARK) without added ingredients are known to be transparent. Applicants have not limited their composition entirely with the use of the term "transparent". A transparent product is seen to be found in Emoto because the claimed composition is disclosed (col. 2, lines 45-50). Nothing has been shown that when using low levels of protein and fat, that the composition is not transparent. In addition, it would have been within the skill of the ordinary worker to not use particular ingredients if one wanted a transparent drink just as it is known to add or not add opacifying ingredients to JELLO (TRADEMARK), such as sour cream or mayonnaise, depending on the required product. No basis is seen in the specification for the phrase "consisting essentially of" to rule out other ingredients, however, applicants could limit their claims with the phrase "consisting of".

Applicants argue that Emoto does not teach a transparent composition having a pH of from 3.3 to 4. This is not seen because the abstract states that the pH is 3.3 to 4 and the limitation as to transparency has been discussed above.

Applicants argue as to Tomida that the pH is 4.5 or more. However, the use of SFE and making a transparent beverage is explained by the reference. No patentable

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distinction is seen in a pH of 4 and of 4.5 at this time, as nothing has been shown that the particular beverages with this pH would become cloudy at 4 or less.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication should be directed to Helen F. Pratt at telephone number 703-308-1978.

HP 7-31-03


HELEN PRATT
PRIMARY EXAMINER